J. in *Chan Siew Kim v. Woi Fung Sheng Tim Medical Store & Anor. (Supra).*

Therefore the Order of the Rent Appeal Board dated 28.4.81 directing the Rent Tribunal to determine the fair rent and the proceedings consequent thereto are a nullity.

Judgment

The Order of the Rent Appeal Board, State of Penang, dated 28.4.81 in Appeal No. 1/78 and all proceedings consequent thereto be removed into this court and be quashed.

Costs of and incidental to Application to be taxed and paid by the Respondents to the Applicants.

Application allowed.

Solicitors: *Sharma & Co.; Geh Cheng Lok & Co.*

KRISHNA KUMAR v. UNITED MALAYAN BANKING CORPORATION BHD.

[O.C.J. (Gunn Chit Tuan J.) April 21 & 23, 1982]
[Penang – Originating Motion No. 27 of 1982]

Land Law – Caveat – First chargee refused to consent to Bank for creation of second charge – Bank lodged private caveat – Application to remove said private caveat – Whether bank had registrable interest – Intention of the parties – National Land Code, s. 323(1) (a) & (b).

Land Law – Charge – Registrable charge – Intention of the parties to create one.

The applicant in this case gave MBF a first charge on his land on December 27, 1976. But on or about June 1976, three companies of which the applicant was the managing director had obtained loans from the bank, and the said companies later defaulted in their repayments. The applicant and the three companies in consideration of the bank forbearing to sue them for recovery of the said loans agreed to provide additional security in the nature of a second charge on the said lands conditional upon and subject to the consent of MBF, the first chargee. MBF granted conditional consent on October 31, 1977 and the relevant second charge documents were signed by the applicant and sent by the bank's solicitors to MBF for their consent on October 25, 1978. MBF refused to grant consent for the creation of a second charge in favour of the bank for the reason, *inter alia*, that the bank had delayed in sending them the second charge instruments. On May 8, 1979 the bank proceeded to register a private caveat on the said land and on November 12, 1979 the bank sued the 3 companies and the applicant for the outstanding loans in Civil Suit Nos. C720, C721 and C722 of 1979. On February 12, 1982 the bank applied for and obtained an Order that the private caveat be extended until the final disposal of the Civil Suit Nos. C720, C721 and C722 of 1979.

The applicant applied to set aside the said Order and for the removal of the private caveat.

Held, dismissing the application: (1) an instrument of charge in registrable form is an example of a registrable interest within the meaning of section 323(1)(a) of the National Land Code;

(2) the fact that MBF had not endorsed its consent on an annexure to the said charge did not detract from the fact that it was an instrument of charge in registrable form and that even if the relevant authorities had refused to accept it for registration, nevertheless the bank had a registrable interest in the land within the meaning of the said section 323(1)(a);

(3) even if it was considered that the bank had no registrable interest because the relevant charge was not in registrable form without MBF's consent, the bank had a right to such registrable interest. There was at all times an intention on the part of the applicant to create a charge in favour of the banks and he as well as his 3 companies did in fact execute the relevant charge form and a supplementary security agreement;

(4) in the circumstances of the case the applicant's notice of originating motion should be dismissed and the caveat remain extended until disposal of the pending civil suit.

Cases referred to:-

(1) *R & I Securities Sdn. Bhd.* v. *Golden Castle Finance Corporation (M) Bhd.* [1979] 1 M.L.J. 46.
(2) *In the matter of Registration of Caveat Vol VI Folio No. 46* (1908) Innes 114.
(3) *K. Sockalingam Mudaliar* v. *M.R.M. Ramasamy Chettiar & Veerammal* [1938] M.L.J. 237; F.M.S.L.R. 77.
(4) *Intercontinental Mining Co. Sdn. Bhd.* v. *Societe Des Etains De Bayas Tudjuh* [1974] 1 M.L.J. 145.
(5) *Mahadevan & Anor.* v. *Patel* [1975] 2 M.L.J. 207, 208.
(6) *Macon Works & Trading Sdn. Bhd.* v. *Phang Hon Chin* [1976] 2 M.L.J. 177, 182.

ORIGINATING MOTION.

K.S. Narayanan for the applicant.
Dr. Stephen Goh Tyau Hin for the respondents.

Cur. Adv. Vult.

Gunn Chit Tuan J.: On February 12, 1982 the United Malayan Banking Corporation Berhad (the bank) applied *ex parte* for and obtained an order that the private caveat in respect of lands held under pegangan No. 503 and 504 daftar sementara and lot No. 2838 grant No. 1272 respectively held under PB 14 DTL Pulau Pinang and Mukim 18 DTL Pulau Pinang (the said lands) be extended until K.L. High Court Civil Suits No. C720, C721 and C722 of 1979 filed by the bank against the registered proprietor, Krishna Kumar s/o T.N. Sharma (the applicant) had been finally disposed of or until the applicant pay up the amount of security or provide an alternative security. The applicant therefore applied by notice of originating motion in April 1982 for an order to set aside that order and that the Registrar of Titles be directed to remove the said private caveat entered against the said lands.

The applicant as the registered proprietor of the said lands gave Malaysian Borneo Finance Corporation Berhad (MBF) a first charge on the said lands which was created on December 27, 1976. But on or about June 1976 three companies of which the applicant is the managing director had obtained loans from the bank, and the said three companies later defaulted in their repayments. The applicant and the three companies in consideration of the bank forbearing to sue them for recovery of the said loans agreed to provide additional security in the nature of a second charge on the said land conditional upon and subject to the consent of MBF, the 1st chargee. MBF granted conditional consent on October 31, 1977 and the relevant second charge documents were signed by the applicant and sent by the bank's solicitors to MBF for their vetting and consent on October 25, 1978. By a letter dated November 22, 1978, MBF refused to grant consent for the creation of a second charge in favour of the bank for the reason that the bank had delayed in sending them the second charge documents and also in view of the then existing circumstances. In those circumstances the bank proceeded to register the said private caveat on the said lands on May 8, 1979. And on November 12, 1979 the bank proceeded to sue the said three companies and the applicant by Kuala Lumpur High Court Civil Suit Nos. C720, C721 and C722 of 1979 for recovery of the outstanding loans.

When the applicant agreed to provide certain additional collateral security, which included the second charge on the said lands, it was also decided that there would be a restructuring of the loan arrangement. The arrangement between the applicant and the bank was incorporated in a supplementary security agreement which was executed by the applicant but not by the bank and was in any event not consented to by MBF. It was pointed out by Mr. Narayanan, counsel for the applicant, that the said agreement was not dated and as it was not executed by the bank nor consented to by MBF there was, therefore, no concluded agreement by the applicant to grant a second charge and therefore the bank could not claim that it had a caveatable interest. It was the submission of counsel that if and so long as MBF does not give its consent for any reason whatsoever, the applicant is incapacitated from providing a second charge on the said lands to the bank and unless MBF gives its consent which the bank knew was a prerequisite for the creation of a second charge, the bank could not have any registrable interest to enable it to enter a caveat on the said lands. He referred to *R & I Securities Sdn. Bhd.* v. *Golden Castle Finance Corporation (M) Bhd.*[1] in which case the registered proprietors of a piece of land gave a first charge to the respondents and an unregistered second charge to the applicants. The applicants' second charge was not registered as the respondents, as first chargee, refused to grant their consent to the creation of the second charge. The applicants sought for the extension of the caveat registered against the piece of land until the civil suit filed by them against the registered proprietors had been finally disposed of or until payment of security. It was held by Syed Othman J. (as he then was) that the registered proprietors in that case had by clause 6 of the first charge at their own instance disabled themselves from creating further charges without the consent of the first chargee. The applicants were aware of the restrictions and in the circumstances their application was dismissed. Counsel submitted in the present case that the bank was clearly aware of a clause in the charge to MBF which required its consent before a second charge can be created and as the applicant without MBF's consent was unable to create a second charge in favour of the bank, the bank, it was submitted, could not have a registrable interest to caveat the said lands.

Both Mr. Narayanan and Dr. Stephen Goh, counsel for the bank, submitted that there were in fact only two issues in this case, namely whether the consent of the first chargee was necessary for the creation of a second charge on the said lands and secondly whether without consent of the first chargee there was in this case a registrable interest. My attention was drawn to the case of *In the matter of Registration of Caveat. Vol. VI Folio No. 46*[2]. That case was concerned with a petition arising out of the refusal by the Registrar of Titles to registar a caveat. The petitioner was a moneylender and had lent $1,300 to the respondent, a Chinese woman, upon the condition (as he alleged) that she would charge land to him as security for the loan. The charge could not be executed at the time because the certificate of title for the land was not in the possession of the woman. The promise to charge was an oral one. The petitioner, suspecting the woman was about to dispose of the land, lodged a caveat forbidding the registration of any dealing with the land. The Registrar of Titles refused to register the caveat on the ground that the petitioner had not such an interest in the land under section 68 of the Registration of Titles Regulation as would support a caveat. Innes J.C. held that the promise to charge conferred, in the circumstances, upon the petitioner a caveatable

interest in the land. His Honour also said in his judgment that:-

"the close analogy between injunctions and caveats has been pointed out by a well-known writer on the Torrens system (Hogg), and it has been stated that the true principle which should govern the question whether an interest is caveatable or not would seem to be that a caveat may be entered in circumstances which would justify an injunction being granted by the courts. The principle seems to be one that may be applied with advantage in the interpretation of the provisions of Part XI of the Registration of Titles Regulation 1891 dealing with caveats."

Mr. Narayanan conceded earlier on that this decision was against the applicant's case but he submitted later that it was distinguishable because the chargor's promise to create a charge was unconditional. With respect I would agree with the abovequoted reasoning of Innes J.C. in that case although I had also pointed out to counsel that in fairness to his client it ought to be borne in mind that we had not all seen the relevant provisions of the former Registration of Titles Regulation 1891 and are not therefore in a position to know whether they are *in pari materia* with the provisions of section 323 of the National Land Code, 1965, to which reference would be made later.

Another old case referred to by both counsel was *K. Sockalingam Mudaliar* v. *M.R.M.Ramasamy Chettiar & A. Veerammal*[3]. In that case the second defendant was the registered proprietor of three pieces of land held under entry in the mukim register. On the date of the charge in question there were two charges registered against the land and a caveat but these do not affect the point in issue. On January 22, 1937, the second defendant executed a further charge over these lands in favour of the plaintiff, the consideration therefor being stated to be $3,300.00. The plaintiff presented the charge to the proper registering authority for registration but the latter refused to register it because the plaintiff had failed to present the issue documents of title together with the charge as required by section 129 of the Land Code. On February 24, 1937, the plaintiff lodged a caveat against the said lands claiming an "interest" therein by virtue of the unregistered charge. On March 5, 1937, the first defendant attached the said lands in execution of a decree in his favour against the second defendant. The first defendant had notice of the plaintiff's unregistered charge when he caused the attachment to be made. The plaintiff instituted a suit claiming a declaration that the three pieces of land were not liable to attachment or, in the alternative, that such attachment was subject to the plaintiff's unregistered charge of January 22, 1937. It was held by Aitken, J. that the unregistered charge conferred on the plaintiff an "equitable interest" evidenced by the caveat in the three pieces of land and that the lands if sold in execution must be sold subject to the unregistered charge. Mr. Narayanan again, having conceded earlier on that this decision is also against the applicant's case, submitted later that the said case did not decide whether the caveat was rightly placed or not and neither was it a case involving the removal of caveat and therefore should be distinguished from the present case.

Finally, after submitting that on the balance of convenience the caveat should not be allowed to remain, Mr. Narayanan, as well as Dr. Stephen Goh, referred to section 323(1) (a) of the National Land Code 1965 which reads as follows:-

"(1) The persons and bodies at whose instance a private caveat may be entered are -

(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;"

Whilst Mr. Narayanan submitted that there are three instances when a private caveat may be entered under the said sub-section, Dr. Stephen Goh submitted that the section has only two limbs. With respect and without relating in full the submissions of both counsel on the said sub-section, I agreed with them in the first instance that the bank clearly had no claim to the titles of the said lands. But, as regards the question whether the bank had any registrable interest in the said lands, I agreed with the submission of Dr. Stephen Goh, who referred to pages 572 and 573 of *Sihombing's* National Land Code that an instrument of charge in registrable form was an example of a registrable interest within the meaning of section 323(1)(a) of our National Land Code, 1965. In this case, the applicant as well as his three companies had already executed the relevant charge as well as a supplementary security agreement and although the bank has not signed the said agreement, it could do so at any time and there was therefore in this case not only an agreement but also in my view an instrument of charge in registrable form. The fact that MBF had not endorsed its consent on an annexure to the said charge which might therefore not be accepted by the relevant administrative authorities, did not in my view detract from the fact that it is an instrument of charge in registrable form and that even if the relevant authorities had refused to accept it for registration, nevertheless the bank had in my judgment a registrable interest

in the said lands within the meaning of section 323(1)(a) of the National Land Code, 1965.

Even if it is considered that the bank did not have any registrable interest in the said lands because the charge in question was not in a statutory form which complied with the relevant provisions of the National Land Code, 1965, I was of the view that this case was also covered by the last limb of section 323(1)(a) of the said National Land Code. In this case, even if it was considered that the bank had no registrable interest because the relevant charge was not in a registrable form without MBF's consent, I considered that in the circumstances of this case, the bank had a right to such registrable interest. There was at all times an intention on the part of the applicant to create a charge in favour of the bank and he as well as his three companies did in fact execute the relevant charge form as well as a supplementary security agreement. MBF had originally given its consent by letter subject to two conditions and it only withdrew the consent about a year later after there was some delay on the part of various parties including the bank's former solicitors and because of changed circumstances.

It would be relevant here to refer to the Federal Court case of *Inter-Continental Mining Co. Sdn. Bhd.* v. *Societe Des Etains De Bayas Tudjuh*[4]. In that case it was held that the agreement between the parties was in substance a sublease though not in the statutory form and equity would treat it as an agreement for a sublease and specifically enforce. it. The appellants therefore had a right in equity to a registrable interest in the land and therefore had a caveatable interest under section 323(1)(a) and 323(1)(b) of the National Land Code. Mr. Narayanan contended that that case was distinguishable because in the present case the bank could not succeed in an action for specific performance against the applicant as MBF would not consent to the second charge. He also stated that the bank would not succeed in its proposed action for specific performance against MBF. I disagreed with the contention of Mr. Narayanan because with respect I considered that the criterion in the ratio of the *Intercontinental Mining* case was not whether one would succeed in an action for specific performance but whether one had what the Federal Court in that case had described as "a right in equity to a registrable interest in the land".

Amongst all the other cases quoted by both counsel, it is only necessary in my view to refer to another Federal Court case, namely, *Mahadevan & Anor.* v. *Patel*[5]. In that case one Ratnavale had business dealings with the respondent who was the managing director of M/s Manilal & Sons (M) Ltd. A loan of $250,000.00 was made to Ratnavale and he acknowledged receipt of this sum from the company. It was the intention that there would be a charge over lands belonging to Ratnavale but the lands were in fact not charged. The respondent caused a caveat to be entered against the lands of Ratnavale. The appellants, after the death of Ratnavale, applied to have the caveat removed. It was argued that it was the company who had a caveatable interest but not the respondent. The learned judge held that the respondent had a caveatable interest and refused the application for the removal of the caveat. The appellants appealed and it was held by the Federal Court dismissing the appeal that as it appeared that the money was lent by the company and that it was the intention of the parties that the loan should be secured by a charge, both the company and the respondent, acting as the managing director of the company, had a caveatable interest in the lands. Here again Mr. Narayanan sought to distinguish this case by contending that the charge in that case could not be created because of the death of Ratnavale whereas the present case was distinguishable in that the second charge could not be created because MBF had refused and still refuses to give its consent. With respect again I did not consider that the difference in the facts of *Mahadevan's* case and the present case mattered. What is important and relevant is that there was the intention of the parties in both cases to create a charge and as such I considered that in this case as in *Mahadevan's* case the bank, therefore, had a right to a registrable interest.

In conclusion, I would refer to and with respect agree with the following *dictum* of Hashim Yeop A. Sani, J. in the case of *Macon Works & Trading Sdn. Bhd.* v. *Phang Hon Chin*[6] in which his Lordship expressed the same opinion as that made by Suffian L.P. in *Mahadevan's* case and said that:-

> "It has been well established that as far as our Land Code is concerned the whole system of caveats is founded on the principle that they exist for the protection of *alleged* as well as proved interest and therefore not only is a person who has a right to a registrable interest in land who may enter a caveat but also any person claiming title to it or any registrable interest in any alienated land or even claiming only a right to such title or registrable interest may enter a caveat."

Therefore in all the circumstances of this case, which would also justify an injunction being grant-

ed by the courts, and for the foregoing reasons, I dismissed the applicant's said notice of originating motion with costs so that the caveat entered against the said lands remain extended until disposal of the said K.L. High Court civil suits.

Application dismissed.

Solicitors: *Ng Ek Teong; Stephen Goh & Partners.*

NG CHUI SIA v. MAIMON BT. ALI

[A.C.J. (Hashim Yeop A. Sani J.) May 5, 1982]
[Kuala Lumpur – Civil Appeal No. 99 of 1981]

Road Traffic – Negligence – Road accident – Onus on injured person to prove negligence – Misdirection on law by magistrate.

This was an appeal against a finding of 100% liability made by the learned magistrate in an accident case where both the rider of a motorcycle and the pillion rider were killed. The plaintiff was the administrator of the estate of the deceased pillion rider and the appellant was the driver of the motor car involved in the accident.

Held, allowing the appeal: (1) the grounds of judgment of the learned magistrate were, with respect, in most parts incomprehensible. There was an apparent confusion of law and insufficient appreciation of the facts. There were many instances in the grounds of judgment which showed that the magistrate had misdirected himself on the law and applied the wrong test and that he imposed on the defendant the onus of proving that he was not negligent;

(2) when an accidental harm is done, it is not for the doer to excuse himself by proving that the accident was inevitable and that there was no negligence on his part. It is for the person who suffers the harm to prove affirmatively that the accidental harm was due to the negligence of the other person;

(3) applying the law to the facts of the case, the magistrate's finding that the appellant was 100% liable against the deceased pillion rider could not be sustained.

MAGISTRATE'S APPEAL.

Joga Singh for the appellant.
Mahindar Singh for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: This was an appeal against a finding of 100% liability made by the learned Magistrate in an accident case where apparently both the rider of a motor cycle and the pillion rider were killed. The plaintiff before the Magistrate was the administrator of the estate of the deceased pillion rider. The appellant was the driver of the motor car involved in the accident.

At the trial before the Magistrate the plaintiff brought two witnesses neither of whom saw the collision. PW2 was riding another motor cycle behind the deceased along Jalan Banting when he saw his friend (the deceased) "fall at Simpang Morib". PW2 stopped his motor cycle and found that his friend had died. He then lodged a Police Report No. 979/75 Telok Datok. In the report PW2 stated that he was then travelling behind the deceased at a distance of about one mile.

The appellant was the sole witness for the defence. According to his evidence he was on the correct side of the road when he saw two persons fall from a motor cycle and they were thrown towards his car. According to him the motor cycle knocked his car and he lodged a Police Report No. 982/75. In his report he stated that as he arrived at the 24th milestone Jalan Banting/Sepang, one motor cycle coming from the direction of Jalan Morib suddenly skidded and was thrown towards his car.

In the statement of defence paragraph 3. thereof stated that the motor cycle concerned skidded and both the rider and the pillion rider "flew towards" the motor car. In the statement of agreed facts paragraph 3 thereof stated that a collision occurred on the day in question between the deceased riding pillion on the motor cycle and the motor car driven by the defendant.

It seems quite obvious that on the pleadings as well as the evidence all that was established was that there was an accident and a collision occurred between the deceased and the defendant's motor car.

The grounds of judgment of the learned Magistrate are with respect in most parts incomprehensible. There is an apparent confusion of the law and insufficient appreciation of the facts. There are many instances in the grounds of judgment which show that the Magistrate misdirected himself on the law and applied the wrong tests and that he imposed on the defendant the onus of proving that he was not negligent.

In an action for negligence the onus of proving the allegation of negligence rests on the person who makes it unless there are disclosed facts which raise a presumption in favour of the plaintiff. The plaintiff must show affirmatively that there has